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In the Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF HEALTH AND HUMAN SERVICES,
PETITIONER

v.

LEON S. DAY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in the absence of any showing of bad faith, delays in the administrative adjudication of claims for disability benefits under Title II of the Social Security Act, 42 U.S.C. (& Supp. IV) 401 *et seq.*, arising from a substantial backlog of cases and resource limitations, violate claimants' statutory right to "reasonable notice and opportunity for a hearing" (42 U.S.C. 405(b)) and justify judicial imposition of time limits on the processing of such claims.

2. Whether, in the absence of statutory authorization, a court may enforce judicially imposed processing deadlines by requiring the Secretary of Health and Human Services to pay interim benefits from the Disability Insurance Trust Fund to claimants who have not been found entitled to such benefits but whose cases have not been decided prior to the deadlines.

PARTIES TO THE PROCEEDING

The petitioner is the Secretary of Health and Human Services. Richard S. Schweiker, the appellant in the court of appeals, resigned as Secretary effective February 4, 1983, and his successor has not yet been appointed. The respondents are Leon S. Day and Amedie Maurais, who are representatives of the following class of claimants for disability benefits under Title II of the Social Security Act, 42 U.S.C. (& Supp. IV) 401 *et seq.*:

> All present and future Vermont residents seeking to secure Social Security disability benefits who, following an initial determination by the [Secretary] that no disability exists, experience an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings.

App. D, *infra*, 12a n.1.[1]

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[1] Respondents Day and Maurais had received an ALJ hearing and decision prior to the district court's certification of the class on June 14, 1979. The district court held that the case was not moot, however, concluding that the case fell within the exception recognized in *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975), for situations in which the challenged condition is temporary and the issue as regards any particular class representative might become moot before the district court even could rule on the class certification issue. C.A. App. 78a. See also *Sosna* v. *Iowa*, 419 U.S. 393, 402 n.11 (1975); *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 398-399 (1980). The district court also found that respondents Day and Maurais would be suitable representatives of the class in these circumstances. C.A. App. 77a; see *United States Parole Commission* v. *Geraghty*, *supra*, 445 U.S. at 405-407.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
1. Background	2
2. The proceedings in this case	6
Reasons for granting the petition	11
Conclusion	24
Appendix A	1a
Appendix B	10a
Appendix C	11a
Appendix D	12a
Appendix E	21a
Appendix F	32a

TABLE OF AUTHORITIES

Cases:

Army and Air Force Exchange Service v. *Sheehan*, No. 80-1437 (June 1, 1982) 22

Barnett v. *Califano*, 580 F.2d 28 ..... 7, 8, 10, 12, 14, 15, 17

Blankenship v. *Secretary of HEW*, 532 F. Supp. 739 ..... 13-14, 17

Blankenship v. *Secretary of HEW*, 587 F.2d 329 ..... 10, 13, 15, 16

Califano v. *Yamasaki*, 442 U.S. 682 21

Caswell v. *Califano*, 583 F.2d 9 ..... 9, 12, 15, 17

Crosby v. *Social Security Administration*, No. 81-675-T (D. Mass. Nov. 16, 1982) ... 13, 16

Cases:—Continued Page

Federal Crop Insurance Co. v. *Merrill*, 332 U.S. 380 23

Finch v. *Schweiker*, No. Civ. Nos. C 75-0185 L(A), C 76-0441 L(A) (W.D. Ky. Feb. 17, 1982) 13, 14

FTC v. *J. Weingarten, Inc.*, 336 F.2d 687 . 16

INS v. *Miranda*, No. 82-29 (Nov. 8, 1982) . 23

Lassiter v. *Department of Social Services*, 452 U.S. 18 19

Lehman v. *Nakshian*, 453 U.S. 156 23

Little v. *Streater*, 452 U.S. 1 19

Martinez v. *Califano*, Civ. No. 73-C-900 (E.D. N.Y. Jan. 3, 1978) 12, 16, 17

Mathews v. *Eldridge*, 424 U.S. 319 ..... 4, 5, 18, 19, 21, 22

Open America v. *Watergate Special Prosecution Force*, 547 F.2d 605 20

Pine Hill Coal Co. v. *United States*, 259 U.S. 191 22

Richardson v. *Perales*, 402 U.S. 389 3

Schweiker v. *Hansen*, 450 U.S. 785 .... 11, 12, 23

Sharpe v. *Harris*, 621 F.2d 530 .... 10, 12, 16, 17

United States v. *Testan*, 424 U.S. 392 ..... 22, 23

Vermont Yankee Nuclear Power Corp. v. *National Resources Defense Council, Inc.*, 435 U.S. 519 21

White v. *Mathews*, 559 F.2d 852, cert. denied, 435 U.S. 908 ..... *passim*

Wright v. *Califano*, 587 F.2d 345 .. 10, 14, 15, 16

Constitution, statutes and regulations:

United States Constitution:

Article 1, Section 9, Clause 7 22

Constitution, statutes and regulations:—Continued

	Page
Due Process Clause (Fifth Amendment)	9
Administrative Procedure Act, 5 U.S.C. ...	9
Social Security Act, Title II, 42 U.S.C. (& Supp. IV) 401 *et seq.*	2
Section 205(a), 42 U.S.C. 405(a)	13
Section 205(b), 42 U.S.C. (Supp. IV) 405(b)	3, 4, 7, 11, 18, 19, 23
Section 205(g), 42 U.S.C. 405(g)	4
Section 205(i), 42 U.S.C. 405(i)	10, 22
Section 221(a), 42 U.S.C. 421(a)	3
Section 221(c), 42 U.S.C. 421(c)	3
Section 221(i), 42 U.S.C. (Supp. IV) 421 note	4
Section 223(a)(1), 42 U.S.C. (& Supp. IV) 423 (a)(1)	22
Section 223(d)(2)(A), 42 U.S.C. 423(d)(2)(A)	2
Social Security Act, Title XVI, 42 U.S.C. (& Supp. IV) 1381 *et seq.*	2
Section 1611(a), 42 U.S.C. 1382(a)	18
Section 1611(a)(2)(B), 42 U.S.C. 1382(a)(2)(B)	2
Section 1631(c)(2), 42 U.S.C. 1383(c)(2)	5, 18
Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 *et seq.*:	
Section 304(a), 94 Stat. 457	5
Section 308, 94 Stat. 458	6, 19
Pub. L. No. 97-455, 96 Stat. 2497 *et seq.*:	
Section 2, 96 Stat. 2498	6, 21
Section 3, 96 Stat. 2499	20
Section 4, 96 Stat. 2499	6, 21

Constitution, statutes and regulations:—
Continued Page
Pub. L. No. 94-202, Section 3, 89 Stat. 1135 20
20 C.F.R.:
Section 404.907-404.921 3
Section 404.929 4
Section 404.929-404.961 3
Section 404.967-404.983 4
Section 404.1503 3
Section 404.1615 3
Part 416, Subpart N 4

Miscellaneous:
128 Cong. Rec. (daily ed. Dec. 21, 1982):
p. S15963 21
p. S15964 21
p. S15965 21
Department of Health and Human Services, Office of Hearings and Appeals, *Key Workload Indicators* (Oct. 1982) 3, 5
Department of Health and Human Services, *Social Security Annual Report to the Congress for Fiscal Year 1981* (1982) 3, 4
Goldman, *Administrative Delay and Judicial Relief*, 66 Mich. L. Rev. 1923 (1968) . 16
J. Mashaw et al. *Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System* (1978) 11
Note, *Judicial Resolution of System Delays in Social Security Hearings*, 79 Colum. L. Rev. 959 (1979) 20

Miscellaneous:—Continued Page

Report of the Staff of the House Subcomm. on Social Security of the House Comm. on Ways and Means, 94th. Cong., 1st Sess., *Appeals Process: Areas of Possible Administrative or Legislative Actions*, (Comm. Print 1975) 19

Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Social Security Hearings and Appeals: Pending Problems and Proposed Solutions* (Comm. Print 1981) 4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 685 F.2d 19. The opinions of the district court (Apps. D & E, *infra*, 12a-20a, 21a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 10a) was entered on June 28, 1982, and a petition for rehearing was denied on September 17, 1982 (App. C, *infra*, 11a). On December 7, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 205(b) of the Social Security Act, 42 U.S.C. (Supp. IV) 405(b), provides in pertinent part:

> The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision.

STATEMENT

1. *Background*

Title II of the Social Security Act, 42 U.S.C. (& Supp. IV) 401 *et seq.*, provides, *inter alia*, for the payment of disability benefits to insured individuals who, because of physical or mental impairment, are unable to do their previous work or to engage in any kind of substantial gainful work that exists in the national economy. 42 U.S.C. 423(d)(2)(A). Disability benefits also are payable under the Supplemental Security Income (SSI) program established by Title XVI of the Act, 42 U.S.C. (& Supp. IV) 1381 *et seq.* See 42 U.S.C. 1382(a)(2)(B). Both statutory provisions require the

Secretary, in determining whether a claimant is disabled, to consider the claimant's physical and mental impairments and the vocational factors of age, education, and work experience.

The disability progams established by Title II and XVI "are of a size and extent difficult to comprehend." *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971). In fiscal year 1981 alone, approximately 2.3 million claims for disability benefits were filed under the two titles.[2] To provide for an orderly determination of the eligibility of this number of claimants, Congress and the Secretary have devised a four-level system of administrative consideration of disability claims.

Under the Title II program, with which this case is concerned, the determination whether a claimant is under a disability and the date on which the disability began or ceased is made by a state agency in the first instance. 42 U.S.C. 421(a); 20 C.F.R. 404.1503. By regulation, the Secretary has provided that if the claimant is dissatisfied with the initial eligibility determination, he may request a de novo reconsideration by the appropriate state agency. 20 C.F.R. 404.907-404.921 and 404.1615. In fiscal year 1981, more than 413,000 requests for reconsideration were processed.[3]

If the decision after reconsideration by the state agency is adverse to the claimant, he is entitled to a hearing by the Secretary in the same manner as provided in 42 U.S.C. (Supp. IV) 405(b) for all other claimants under the Old Age, Survivors and Disability Insurance (OASDI) Program. See 42 U.S.C. (Supp. IV) 421(c); 20 C.F.R. 404.929-404.961. Under 42 U.S.C. (Supp. IV) 405(b), the Secretary is required to provide "reasonable notice and opportunity for a hearing" with

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[2] Department of Health and Human Services, *Social Security Annual Report to the Congress for Fiscal Year 1981*, at 23, 26 (1982).

[3] Department of Health and Human Services, Office of Hearings and Appeals, *Key Workload Indicators* 15 (Oct. 1982).

respect to "decisions as to the rights of any individual applying for a payment" of benefits under Title II. If the claimant is dissatisfied with the decision rendered after the hearing, he may take an administrative appeal to the Appeals Council in HHS. 20 C.F.R. 404.967-404.983. After the individual has exhausted his administrative remedies in this fashion, he may seek judicial review of a final denial of benefits pursuant to 42 U.S.C. (Supp. IV) 405(g). See generally *Mathews* v. *Eldridge*, 424 U.S. 319, 335-339 (1976).[4]

The administrative hearings provided for in 42 U.S.C. (& Supp. IV) 405(b) are conducted by a corps of Administrative Law Judges (ALJs) in HHS. 20 C.F.R. 404.929. The total number of ALJ hearings requested annually under all Social Security programs increased from approximately 72,000 in fiscal year 1973 to more than 320,000 in fiscal year 1982.[5] The vast majority of these hearing requests are in disability cases.[6] The increase in the number of hearing requests is expected to continue in future years, in part because of a legislative requirement that the Secretary provide for a periodic review of the eligibility of individuals who are already receiving disability benefits—a process that predictably will result in an increase in the number of recipients whose benefits are terminated and who subsequently request reconsideration and an ALJ hearing. See Section 221(i) of the Act (42 U.S.C. (Supp. IV) 421 note),

[4] Similar procedures are followed in SSI disability cases under Title XVI of the Act. See 20 C.F.R. 416, Subpart N.

[5] *Key Workload Indicators*, note 3, *supra*, at 1.

[6] In fiscal year 1981, more than 250,000 of the 281,737 hearing requests were in disability cases. *1981 Annual Report*, note 2, *supra*, at 23, 26. In fiscal year 1980, more than 95% of all hearing requests involved Title II or Title XVI disability claims. Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Social Security Hearings and Appeals: Pending Problems and Proposed Solutions*, 2 (Comm. Print 1981).

as added by Section 304(a) of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 457.[7]

To meet this greatly increased workload, the number of ALJs in HHS was increased from 420 in fiscal year 1973 to 813 in October 1982. The support staff per ALJ was more than doubled during this same period, and there is now an average of more than four support personnel for each ALJ. The result of these and other administrative initiatives has been to increase the average number of dispositions per ALJ each month from 14 in 1973 to 34 in 1982. Thus, today, on the average, an ALJ decides 1½ cases each working day.[8] During this same 10-year period, the average processing time from the date on which an evidentiary hearing was requested to the date on which the ALJ rendered his decision varied between a high of 288 days in fiscal year 1976, when *Mathews* v. *Eldridge* was decided (see 424 U.S. at 341-342), to a low of 151 days in 1979. In fiscal year 1982, the average processing time was 174 days, the same as it had been in 1973, thereby indicating that HHS now has been able to absorb the more than four-fold increase in its hearing caseload since 1973 without further extreme impact on the claimants' interest in receiving a hearing within a reasonable period.

Congress repeatedly has studied the problem of the backlog of disability cases arising from the increase in hearing requests (see pages 19-21, *infra*), but it has declined to impose deadlines for the holding of hearings or the rendering of decisions by the ALJs. For example, although Congress provided in 42 U.S.C. 1383(c)(2) that Title XVI claims generally are to be determined within 90 days of the request for a hearing, Congress expressly excepted disability cases from that deadline, apparently because of the complexity of the disability determination. In 1980, Congress directed the Secre-

[7] See Comm. Print, note 6, *supra*, at 1.

[8] *Key Workload Indicators*, *supra*, note 3, at 1.

tary to submit for its consideration a report "recommending the establishment of appropriate time limitations governing decisions on claims for benefits under title II of the Social Security Act," including a recommended time limitation for all four levels of administrative review. Pub. L. No. 96-265, Section 308, 94 Stat. 458. However, Congress took no action to impose such deadlines after receiving the Secretary's report (App. E, *infra*, 28a n.7).

Finally, in December 1982, when Congress did take affirmative action to reduce the impact of the time needed to adjudicate claims, it did so only in cases involving the cessation of the payment of disability benefits to individuals who previously had been found to be eligible. Congress required that the state agency furnish an opportunity for a face-to-face evidentiary hearing at the reconsideration stage in these termination cases in addition to the opportunity for an ALJ hearing at a later date. Congress further provided, on a one-year experimental basis, that the claimant in a termination case may elect to continue to receive benefits through the ALJ stage, subject to recoupment if he is found to have been ineligible. Pub. L.No. 97-455, Sections 2 and 4, 96 Stat. 2498, 2499. Congress did not provide, however, for a face-to-face hearing at the reconsideration stage in the case of new applications for benefits; nor did it authorize the payment of interim benefits pending the ALJ's decision following a hearing on a new application.

2. ***The Proceedings In This Case***

a. This class action was filed in the United States District Court for the District of Vermont on November 15, 1978, challenging the period of time that elapsed in Title II disability cases in Vermont between a request for reconsideration and the decision on reconsideration and between a request for a hearing and the convening of the hearing. Respondent Day, who had been receiving disability benefits, was initially found to

be no longer disabled in December 1977. He requested a reconsideration of this determination on December 21, 1977, and his claim was denied after reconsideration on June 6, 1978—167 days later. Day then requested an ALJ hearing. That hearing was held on December 4, 1978, soon after Day filed this action and 173 days after he had requested the hearing. On January 17, 1979, the ALJ issued a decision reaffirming the cessation of benefits (App. D, *infra*, 13a-14a). Respondent Maurais, who intervened in this suit on December 1, 1978, was notified in April 1978 that his disability had ceased. He requested reconsideration of that initial determination on June 2, 1978, and an adverse reconsideration decision was rendered on January 4, 1979—215 days after his request. Maurais then requested an ALJ hearing, and the hearing was held 65 days later (*id.* at 14a).

b. On December 28, 1978, the district court granted partial summary judgment for respondents with respect to the timing of ALJ hearings. Relying on the Second Circuit's prior decisions in *White* v. *Mathews*, 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978), and *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978), the district court held that the provision in 42 U.S.C. 405(b) for the Secretary to afford a claimant "reasonable notice and opportunity for a hearing" requires that the ALJ hearing be conducted within a "reasonable" time after it is requested (App. D, *infra*, 15a). In *White* v. *Mathews*, *supra*, a class action of Title II claimants in Connecticut, the court of appeals had held that the average period of 211.8 days between a request for a hearing and the decision following a hearing did not afford an opportunity for a hearing within a reasonable time and ordered the Secretary to reduce that time period for Connecticut claimants to 120 days. 559 F.2d at 858-860. In *Barnett* v. *Califano*, *supra*, the court of appeals had held that the period of 6 or 7 months that ordinarily elapsed between a hearing request and the hearing date for Title XVI disability

claimants in Vermont was unreasonable and ordered that this time be reduced to 90 days. 580 F.2d at 31-33.

The district court acknowledged that the Social Security Administration (SSA) "has made admirable strides in reducing the average length of delay experienced by claimants a few years ago" (App. D, *infra*, 17a). Nevertheless, on the basis of the holdings in *White* and *Barnett* and evidence in this case that 43% of Vermont residents who requested hearings on their Title II disability claims waited more than 90 days for their hearings, the court found that a substantial number of claimants had been denied their statutory right to a hearing within a reasonable time. Accordingly, the court ordered that ALJ hearings be held within 90 days of a request, subject to certain exceptions for delays attributable to the claimant (*id.* at 19a; App. F, *infra*, 33a-34a).[9]

c. On August 19, 1981, the district court granted summary judgment for respondents on the reconsideration aspect of the case as well. Although the Act does not require that there be a de novo reconsideration by a state agency or that any such reconsideration be held within a reasonable time, the court reasoned that reconsideration is an administrative prerequisite to an ALJ hearing and that delays in the reconsideration procedures trench on the statutory duty to provide a hearing within a reasonable time (App. E, *infra*, 27a). The court noted that for the years 1977-1980, reconsideration processing time ranged between 17 and 251 days in Vermont, with a mean processing time of 68 days, and that approximately 35% of the reconsideration requests took more than 90 days to process. The court recognized that it is often necessary to generate additional evidence on reconsideration, but held that a period of time for reconsideration in excess of 90 days is unrea-

[9] The district court previously had imposed a 90-day deadline for the convening of a hearing in Title XVI disability cases in Vermont. See *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978).

sonable except in certain situations in which delay is attributable to the claimant (*id.* at 30a; App. F, *infra*, 33a).[10]

The district court also ordered the Secretary to pay interim disability benefits to any claimant who has not received a reconsideration determination or hearing within 180 days of the request for reconsideration or has not received a hearing within 90 days of his hearing request, even though the claimant has not yet been found by the State or the Secretary to be entitled to such benefits. These benefits were made subject to recoupment by the Secretary if the claimant later were found not to be eligible (App. E, *infra*, 30a-31a; App. F, *infra*, 34a-35a).

d. The court of appeals affirmed (App. A, *infra*, 1a-9a). The court of appeals expressed its "sympath[y] with the severe problems that beset SSA" and its "understand[ing] that [the district court's] decision may have a significant impact on its operations" (*id.* at 6a). But the court nevertheless concluded that judicially imposed timetables were appropriate for the processing of the "flood of claims" confronting SSA (*ibid.*, quoting *White* v. *Mathews*, *supra*, 559 F.2d at 859).

The court of appeals "share[d] the First Circuit's concern that 'if the Secretary's resources truly are inadequate to the task, the more litigious of the applicants may gain an advantage over the less assertive'" (App. A, *infra*, 7a, quoting *Caswell* v. *Califano*, 583 F.2d 9, 17 (1st Cir. 1978)). The court concluded, however, again quoting the *Caswell* decision, that it should not be deterred from awarding relief to the claimants before it by "'the alleged inability of the [Secretary] fully

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[10] Because the district court found violations of the Social Security Act, it did not reach respondents' arguments that the challenged practices violated the Due Process Clause of the Fifth Amendment or the Administrative Procedure Act (App. D, *infra*, 15a; App. E, *infra*, 26a). The court of appeals likewise did not consider those arguments (App. A, *infra*, 9a n.8).

to meet his obligations to others'" (*ibid.*). The court of appeals also recognized "that in the last five years Congress has involved itself heavily in the administration of the Act" and that "Congress has refused to impose its own deadlines," but the court viewed Congress' failure to enact clarifying legislation as perhaps implying that Congress is satisfied that the problem of delay is being handled effectively by the courts (App. A, *infra*, 7a). The court of appeals also approved the district court's extension of its holding in *White* to the reconsideration level (*id.* at 7a-8a).

In sustaining judicially imposed time limits, the court of appeals explicitly acknowledged (App. A, *infra*, 7a-8a) that its decision conflicted with *Wright* v. *Califano*, 587 F.2d 345 (1978), in which the Seventh Circuit held that the time between request and hearing did not warrant any judicial intervention, and was at odds with *Blankenship* v. *Secretary of HEW*, 587 F.2d 329, 335 (1978), in which the Sixth Circuit eschewed judicially imposed deadlines and instead ordered the Secretary to promulgate nationwide regulations to implement the reasonable time requirement. The Second Circuit nevertheless adhered to its prior precedent in *White*, *Barnett*, and *Sharpe* v. *Harris*, 621 F.2d 530 (1980) (App. A, *infra*, 6a-8a).

Finally, the court of appeals rejected the contention that the payment of interim benefits following the violation of judicially imposed deadlines is barred by 42 U.S.C. 405(i), which limits payments from the Disability Insurance Trust Fund to those made "[u]pon final decision of the Secretary or upon final judgment of any court of competent jurisdiction, that [the] person is entitled to any payment or payments" under Title II. In the court's view, this provision does not "'[e]xclude the possibility of interim payments ordered by a court exercising its remedial power" (App. A, *infra*, 8a, quoting *White* v. *Mathews*, *supra*, 559 F.2d at 861). The court of appeals did not believe that its earlier holding in

White, which awarded interim benefits in the absence of statutory authorization, was undermined by this Court's intervening decision in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). The court stated that the interim payments at issue here flow from the "district court's inherent powers to fashion a remedy," not from estoppel (App. A, *infra*, 8a-9a).

REASONS FOR GRANTING THE PETITION

This case directly concerns the most serious administrative problem confronting the Department of Health and Human Services today in its implementation of the Social Security Act: how to assure an accurate, fair, uniform and efficient determination of the entitlement to disability benefits of the several million individuals who apply for benefits or whose continuing eligibility is reviewed each year and the hundreds of thousands of such individuals who seek an evidentiary hearing before an Administrative Law Judge. The disability hearing system has been characterized as "probably the largest adjudicative agency in the western world,"[11] and it is to the Secretary of Health and Human Services, not to the courts, that Congress has entrusted its stewardship on a nationwide basis. 42 U.S.C. (& Supp. IV) 405(b). The ruling of the court of appeals is another in a line of decisions that have sanctioned an unwarranted and increasingly burdensome judicial intrusion into the ALJ hearing process through the imposition of fixed deadlines that Congress itself has declined to impose.

The necessary effect of these decisions will be to require the Secretary to divert scarce resources to the detriment of claimants in other geographic areas and in programs that are not yet subject to judicial decrees. Two other courts of appeals have rejected this ap-

[11] J. Mashaw, et al., *Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System* xi (1978).

proach, recognizing that the courts must defer to the Secretary in giving effect to the statutory requirement of "reasonable notice and opportunity for a hearing." Moreover, in the instant case, the court of appeals has for the first time extended the principle of judicially fashioned processing deadlines to the reconsideration stage, which is primarily the responsibility of the States, not the federal government.

The court of appeals also erred in ordering the payment of interim benefits when its judicially imposed deadlines are not met. This aspect of the decision is inconsistent with statutory provisions directing that funds may be paid out of the Trust Fund only if the recipient has been found eligible for benefits and with this Court's holding in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), that such statutory prerequisites to the disbursement of public funds must be honored by the courts. Review plainly is warranted to resolve these important and recurring questions.

1. a. Four courts of appeals have addressed the issue of the timing of ALJ disability hearings in the last several years, with four different results. The Second Circuit, in the instant case and in three preceding cases, held that the hearing times involved were unreasonable, imposed deadlines on the hearing process, and ordered the payment of interim benefits when those deadlines are not met.[12] The First Circuit, in *Caswell* v. *Califano*, *supra*, concurred in the appropriateness of judicially imposed time limits (583 F.2d at 15-18), but

[12] *White* v. *Mathews*, *supra*, 559 F.2d at 858-860; *Barnett* v. *Califano*, *supra*, 580 F.2d at 31-33; *Sharpe* v. *Harris*, *supra*, 621 F.2d at 531. See also *Martinez* v. *Califano*, Civ. No. 73-C-900 (E.D.N.Y. Jan. 3, 1978).

did not order the payment of interim benefits.[13]

The Sixth Circuit also held that the hearing delays were statutorily unreasonable. *Blankenship* v. *Secretary of HEW*, 587 F.2d 329, 333-334 (1978). However, the Sixth Circuit reversed the district court's order providing for judicially imposed deadlines, principally for three reasons: Congress had declined to impose fixed time limits; such an order in one State would require the shifting of resources from other States; and "[s]implistic and unreasonably short time limitations imposed from the outside without a thorough understanding of the reasons for the problem will frustrate welfare administration, just as it would frustrate judicial administration." *Id.* at 335. Instead, the Sixth Circuit ordered the Secretary to exercise his rulemaking authority under 42 U.S.C. 405(a) to formulate regulations giving substance to the statutory requirement of "reasonable notice and opportunity for a hearing."[14]

[13] However, a district court decision ordering the payment of interim benefits if judicially imposed time limits are not met is currently pending before the First Circuit on the Secretary's appeal. *Crosby* v. *Social Security Administration*, No. 81-675-T (D. Mass. Nov. 16, 1982), appeal pending, No. 83-1077.

[14] On remand in *Blankenship*, the Secretary attempted to develop acceptable regulations and submitted various regulatory proposals to the district court. In the end, however, the Secretary concluded that burgeoning and unpredictable caseloads made any commitment to fixed time limitations in regulations unworkable. The Secretary therefore moved for relief from the regulations requirement in favor of a commitment to establish processing goals. The district court denied the Secretary's motion, ordered him to publish regulations requiring a hearing decision within 180 days of request, and required the payment of interim benefits when the time limits are not satisfied. In a companion case decided the same day, *Finch* v. *Schweiker*, No. Civ. Nos. C 75-0185 L(A), C 76-0441 L(A) (W.D. Ky. Feb. 17, 1982), the district court imposed time limits on yet another stage of the administrative process—decisions by the Appeals Council. *Blankenship* v. *Secretary of Health & Human Serv-*

The Seventh Circuit, in *Wright* v. *Califano*, 587 F.2d 345, 354 (1978), on the other hand, concluded that no judicial intervention whatever in the hearing delay problem was warranted. The Seventh Circuit expressly refused (*ibid.*) to follow *White*, *Barnett*, and *Caswell*, the decisions upon which the court below relied in the instant case (App. A, *infra*, 5a-8a).[15] In the Seventh Circuit's view, a court ordinarily is not competent to evaluate the efficiency of an administrative agency and to make the essentially legislative judgment whether the agency is performing its work with reasonable dispatch. 587 F.2d at 352-353. The Seventh Circuit observed that Congress had committed the timing of hearings to the discretion of the Social Security Administration and, unlike the court below, found it significant that Congress, despite careful monitoring, had failed to prescribe mandatory time limits on that process or to direct the payment of interim benefits. *Id.* at 353. The Seventh Circuit further explained that since the hearing delays complained of were systemwide—and there were no allegations of bad faith, dilatory attitude, or lack of evenhandedness—whether the agency acted reasonably should be judged in light of the resources Congress supplied and the impact of the delay. In these circumstances, the Seventh Circuit concluded, a court should be reluctant to intervene absent "clear congressional guidelines." In *Wright* itself, "given the good faith efforts of the SSA to cope with the delay problem under severe resource constraints and the prospect of

ices, 532 F. Supp. 739, 746-747 (W.D. Ky. 1982). The Sixth Circuit granted a stay of the orders in *Blankenship* and *Finch* pending the Secretary's appeal. The appeal was argued on October 8, 1982, but no decision has yet been rendered. *Blankenship* v. *Schweiker*, Nos. 82-5130, 82-5204.

[15] *Wright* v. *Califano* involved applicants for old age and survivors benefits, not disability benefits, but this distinction did not play a role in the Seventh Circuit's legal analysis.

future progress," the court could not find that the time spent in processing hearing requests was so unreasonable as to warrant judicial intervention. 587 F.2d at 353-354.

Thus, the courts of appeals are in conflict on the propriety of judicial intervention in the HHS disability hearing process and the payment of mandatory interim benefits. The divergence in the lower courts can only be expected to increase in the future, in view of the pendency of at least 13 more class actions challenging delays in the administrative claims procedures.[16]

b. This conflict among the lower courts has substantial practical consequences. The courts of appeals that have considered the matter uniformly have recognized that the Secretary has made significant efforts to manage a caseload that has quadrupled in size over the past decade; and no court has suggested the existence of bad faith or dilatory motive on the part of HHS. See, *e.g.*, *Blankenship* v. *Secretary of HEW*, *supra*, 587 F.2d at 334; *Wright* v. *Califano*, *supra*, 587 F.2d at 352-354; *Caswell* v. *Califano*, *supra*, 583 F.2d at 17-18; *Barnett* v. *Califano*, *supra*, 580 F.2d at 32; *White* v. *Mathews*, *supra*, 559 F. 2d at 861. The district court in this case likewise noted that the Secretary had made "admirable strides" in reducing the waiting period from what it had

[16] In addition to those cited in notes 13 and 14, *supra*, other pending cases include: *Cockrum* v. *Califano*, 475 F. Supp. 1222 (D.D.C. 1979), vacated and remanded, 634 F.2d 1358 (D.C. Cir. 1980), pending on remand, Civ. 78-1147 (D.D.C.); *Cortez* v. *Califano*, Civ. No. B-79-517 (D. Conn.); *Dixon* v. *Miller*, Civ. No. 77-C-1125 (N.D. Ill.); *Fuentes* v. *Harris*, Civ., No. SA-81-CA-398 (W.D. Tex.); *Holman* v. *Harris*, Civ. Action No. 78-494 (M.D. Pa.); *Lopez* v. *Harris*, Civ. No. 81-121 (D. Conn.); *Maloney* v. *Califano*, Civ. No. 77-644 (D.N.M.); *Matheny* v. *Califano*, Civ. No. C-78-132 (E.D. Wash.); *Quintana* v. *Califano*, Civ. No. 78-397 (D.N.M.); *White* v. *Schweiker*, Civ. No. 81-4023 (E.D. N.Y.); *Williams* v. *Schweiker*, Civ. No. 81-1070-C (II) (E.D. Mo.).

been several years earlier (App. D, *infra*, 17a). But despite those efforts, the nationwide *median* case processing time at the hearing stage is currently between 170 and 180 days (see page 5, *supra*). It is therefore clear that the Secretary could not satisfy the 90-day deadline for the holding of hearings imposed in this case or comparable deadlines imposed in other cases if those deadlines were extended nationwide. The only way that such deadlines can be met in the District of Vermont or in other districts where court-imposed deadlines are in effect is for the Secretary to divert scarce resources from other geographic areas and other programs that are not yet subject to such judicial decrees. This would, of course, work to the detriment of claimants who are awaiting hearings in those areas and programs.[17] Such a regime undermines the agency's obligation of even-handed treatment, which is an important element of the guarantee of an opportunity for a hearing within a "reasonable" time. *Wright* v. *Califano*, *supra*, 587 F.2d at 352-353; *FTC* v. *J. Weingarten, Inc.*, 336 F.2d 687, 691-692 (5th Cir. 1964); Goldman, *Administrative Delay and Judicial Relief*, 66 Mich. L. Rev. 1443, 1425 (1968).

It was precisely this prospect of uneven treatment of claimants in different States that led the Sixth Circuit in *Blankenship* to overturn the hearing deadlines imposed by the district court for Kentucky claimants. 587

[17] We have been informed by HHS, for example, that between January 1980 and September 1981, in order to comply with judicially imposed deadlines in the *Sharpe* and *Martinez* decisions in New York (see note 12, *supra*), it was necessary for HHS to transfer more than 5000 cases to ALJs outside of the administrative region and more than 1400 cases to ALJs in other States within that region. Similarly, we have been informed that in order for HHS to comply with the district court's order in *Crosby* (see note 13, *supra*), it has been necessary to transfer all new cases to ALJs outside of Massachusetts while ALJs in that State reduce their backlog.

F.2d at 335. Even the Second Circuit in the instant case and the First Circuit in *Caswell* expressed their concern that if the Secretary's resources are inadequate, litigious applicants in one State will attain an advantage over less assertive claimants in other States (App. A, *infra*, 7a; 583 F.2d at 17). But they proceeded to ignore this concern by nevertheless imposing hearing deadlines of far shorter duration than the national average.

Moreover, there is no uniformity even among those courts which have concluded that judicial intervention is appropriate. The processing time allowed from hearing request to decision varies between 120 days[18] and 180 days,[19] while in other cases, as in the decision below, the relevant deadline is for the holding of the hearing by the ALJ, not his rendering of a decision.[20] These various deadlines are subject to exceptions that in turn vary from district to district, and the reporting and other compliance features of the decrees also differ. The result is to produce disparity even as among the claimants sought to be benefited by the respective decrees and to introduce complex administrative burdens for HHS in seeking to comply with them.[21] The efficient nationwide administration of the Titles II and XVI disability programs cannot tolerate this increasing balkanization.

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[18] *White* v. *Mathews*, *supra*, 559 F.2d at 855; *Sharpe* v. *Harris*, *supra*, 621 F.2d at 531.

[19] *Blankenship* v. *Secretary of Health & Human Services*, *supra*, 532 F. Supp. at 746; *Crosby* v. *Schweiker*, note 13, *supra*.

[20] App. A, *infra*, 5a; *Caswell* v. *Califano*, *supra*, 583 F.2d at 11; *Barnett* v. *Califano*, *supra*, 580 F.2d at 33.

[21] We have been informed by HHS, for example, that differing court orders in *Sharpe*, *Martinez*, and other cases in New York (see note 12, *supra*) have necessitated the establishment of three different administrative systems in that State alone to track the processing of hearing requests.

Review by this Court therefore is necessary to resolve the conflict among the circuits and district courts on the legal issues presented and the appropriate contours of relief, as well as to eliminate the practical disparity among different classes of claimants that has been generated by this and other decisions.[22]

2. a. The court of appeals plainly erred in concluding that the processing time for hearing requests in Vermont was not "reasonable" for purposes of 42 U.S.C. (Supp. IV) 405(b) and that a judicially imposed deadline of 90 days was appropriate. When Congress has desired a fixed deadline for the conduct of ALJ hearings, it has expressly so provided in the Social Security Act itself. For example, Congress has specified that determination of entitlement to SSI benefits should be made within 90 days of the request for a hearing. 42 U.S.C. 1383(c)(2). Prompt action on claims for SSI benefits is of greater importance because entitlement to such benefits, unlike those provided under Title II of the Act, is based on need. 42 U.S.C. 1382(a); compare *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 340-341. Even in the case of SSI benefits, however, Congress excluded disability cases from the 90-day requirement, presumably because of the greater complexity of the determination of disability as compared with other questions involved in SSI cases.

In its decision in *White* v. *Mathews*, *supra*, followed in this case, the Second Circuit relied in imposing time

[22] The Court denied the Secretary's certiorari petition in 1978 seeking review of the judgment of the Second Circuit in *White* v. *Mathews*, 435 U.S. 908. *White*, however, was the first court of appeals' decision presenting these questions. There accordingly was no conflict among the circuits at that time, and the practical consequences might have appeared to the Court to be uncertain. There is now a clear conflict among the circuits, and the adverse consequences of the proliferation of such decisions are manifest, especially since the nationwide caseload continues to increase.

limitations on the language in 42 U.S.C. (Supp. IV) 405(b) that requires the Secretary to provide "reasonable notice and opportunity for a hearing." See 559 F.2d at 858. We agree that timing is one aspect of the requirement that the opportunity for a hearing be "reasonable," but other considerations are relevant as well.

As early as 1975, a congressional report observed that "although mandating by statute certain processing time limits might seem on the surface a desirable thing to do, such legislation might also have an adverse effect on the quality and uniformity of disability adjudication which is already somewhat suspect."[23] Similarly, in 1980, when Congress by statute required the Secretary to submit a report recommending the establishment of time limitations, the statute itself directed the Secretary to take into account "both the need for expeditious processing of claims for benefits and the need to assure that all such claims will be thoroughly considered and accurately determined." Pub. L. No. 96-265, Section 308, 94 Stat. 458. See also *Little* v. *Streater*, 452 U.S. 1, 13-14 (1981); *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 27-28 (1981). The important interest in assuring uniform, thorough, and accurate decisions would not be served if fixed deadlines do not allow a sufficient time for a reasoned adjudication of individual cases or the caseload generally. The court of appeals failed to explore these countervailing considerations that Congress itself declared to be relevant in this very context.

Moreover, even on the question of timing, the individual claimant's interest is only one of the relevant factors, just as it is under the three-part due process test of *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 335. It is

[23] See Report of the Staff of the House Subcomm. on Social Security of the House Comm. on Ways and Means, 94th Cong., 1st Sess., *Appeals Process: Areas of Possible Administrative or Legislative Actions*, 1-2 (Comm. Print 1975).

necessary as well under *Mathews* v. *Eldridge* to consider "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" (*ibid.*). So here, the court of appeals was required to consider the resource limitations and administrative burdens confronting HHS in determining the reasonableness of the timing of the reconsideration and hearing process and the appropriateness of court-ordered deadlines. Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959, 977 (1979). Cf. *Open America* v. *Watergate Special Prosecution Force*, 547 F.2d 605, 614-616 & n.17 (D.C. Cir. 1976). The court below erred in myopically considering only respondents' individual concerns.

b. The numerous and competing factors that must be taken into account in effectuating the statutory requirement of a "reasonable * * * opportunity for a hearing" under programs as vast as Titles II and XVI of the Social Security Act underscore that the problem inherently is one for administrative or legislative—not judicial—resolution. Indeed, at various times, both Congress and the Secretary have adopted measures to improve the adjudication process. In 1976, for example, Congress addressed the backlog problem by permitting the use of non-ALJ hearing officers to consider disability cases. Pub. L. No. 94-202, Section 3, 89 Stat. 1135. In 1978, the Secretary, in order to ensure uniform and efficient determinations of disability, adopted the medical-vocational guidelines at issue in *Schweiker* v. *Campbell*, No. 81-1983.

Similarly, in 1982, Congress afforded the Secretary flexibility in selecting cases for periodic review in order to enable him to accommodate the backlog of new applications and state staffing levels. Pub. L. No. 97-455, Section 3, 96 Stat. 2499. Congress also provided for

face-to-face hearings by state agencies at the reconsideration stage and the payment of interim benefits through the ALJ stage in disability benefit termination cases, in recognition of the backlog in the ALJ hearing process and the special equities involved when a person is currently receiving and perhaps dependent upon his benefits. Pub. L. No. 97-455, Sections 2 and 4, 96 Stat. 2498, 2499. See 128 Cong. Rec. S15963 (daily ed. Dec. 21, 1982) (remarks of Sen. Armstrong); *id.* at S15964 (remarks of Sens. Dole and Levin); *id.* at 15965 (remarks of Sen. Cohen). Thus, Congress was aware of the impact of delays in the ALJ hearing process and adopted what it determined to be appropriate remedies. It did not, however, choose to impose deadlines on the ALJ hearing process or provide for any additional procedures or the payment of interim benefits in the case of new applicants, as the decision of the court of appeals would do.

"[T]his Court has been willing to assume a congressional solicitude for fair procedure" (*Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979)). It also has admonished that "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals" (*Mathews* v. *Eldridge*, *supra*, 424 U.S. at 349). As noted above, no court has suggested that the delays experienced in determining disability claims are the product of bad faith or dilatory motive on the part of HHS. See page 15, *supra*. Accordingly, and in view of the continuing oversight of the process by Congress and the Secretary, there was no basis for the courts below to "engraft[] their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978).

3. Finally, the court of appeals acted without legal authority in ordering the payment of interim benefits as a remedy for the violation of judicially imposed time limits. This Court has emphasized repeatedly that a court may not order monetary relief against the federal government absent a congressional enactment waiving the United States' sovereign immunity. See, *e.g.*, *Army & Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (June 1, 1982); *United States* v. *Testan*, 424 U.S. 392 (1976); *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196 (1922); cf. United States Constitution, Article I, Section 9, Clause 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *").

There is no such statutory authority for the interim payment of disability benefits on the ground of delay. To the contrary, the Social Security Act allows the payment of benefits only upon a "final decision of the Secretary or upon final judgment of any court of competent jurisdiction" that a person is "entitled to payment" (42 U.S.C. 405(i)). In order to be "entitled" to disability benefits, a person must be, *inter alia*, "under a disability" (42 U.S.C. (& Supp. IV) 423(a)(1)). Until the Secretary or a court has found that the claimant is disabled and satisfies the other eligibility criteria, the statute does not authorize payment.[24] It also is significant that when Congress has wished to provide for interim benefits, it has enacted a statute, as it did last year. See page 21, *supra*. The absence of such authorization in other settings reinforces the conclusion that such pay-

[24] Although the district court's order permits the interim benefits to be recouped if the claimant is later found to be ineligible (App. F, *infra*, 35a), this "theoretical right of the Secretary to recover undeserved benefits [would not] result, as a practical matter, in any substantial offset to the added outlay of public funds." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 347.

ments are barred. *Lehman* v. *Nakshian*, 453 U.S. 156, 162-163 (1981).

Just two terms ago, in a Social Security case, this Court reiterated "'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.'" *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 788, quoting *Federal Crop Insurance Co.* v. *Merrill*, 332 U.S. 380 (1947). The court of appeals in the instant case refused to heed this duty. It sought to avoid the force of *Hansen* by characterizing the interim benefit requirement as flowing from the "district court's inherent powers to fashion a remedy" (App. A, *infra*, 8a). But the courts of the United States have no "inherent power" to order the payment of money from the federal Treasury whenever they find a violation of a statute. *United States* v. *Testan*, *supra*, 424 U.S. at 401, 403. Moreover, the remedy a court may fashion for a violation of 42 U.S.C. (Supp. IV) 405(b) surely is limited by the conditions on the payment of money from the Trust Fund contained in Subsection (i) of that same statutory provision. Compliance with those conditions is not excused by mere delay in processing a claim. Cf. *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982). The decision of the court of appeals directing the payment of interim benefits therefore should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1195 August Term 1981

Argued June 9, 1982 Decided June 28, 1982

Docket No. 82-6009

Filed June 28, 1982

LEON S. DAY, ET AL., PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

Before: FEINBERG, Chief Judge, CARDAMONE, Circuit Judge and SAND, District Judge.*

PER CURIAM:

The Secretary of Health and Human Services appeals from various orders of the United States District Court for the District of Vermont, James S. Holden, Ch. J., granting summary judgment in favor of a class of claimants[1] seeking disability benefits under Title II of the Social Security Act (the Act), 42 U.S.C. § 401 et seq.

*United States District Judge for the Southern District of New York, sitting by designation.

[1] The class was certified on June 14, 1979 as:

> All present and future Vermont residents seeking to secure social security disability benefits who, following an initial determination by the defendants that no disability exists, experience an unreasonable delay in a scheduling of and/or issuance of decisions in reconsiderations and their hearings.

We find that most of the arguments raised in this appeal are almost indistinguishable from those decided by us in earlier cases, see *Sharpe* v. *Harris*, 621 F.2d 530 (2d Cir. 1980); *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978); *White* v. *Mathews*, 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978), and that, in any event, our prior decisions are controlling. Accordingly, we affirm the judgment of the district court.

I.

The procedure for challenging an initial determination that a Vermont claimant is ineligible for Title II disability benefits is set out in the Act and regulations adopted thereunder, and is explained in greater detail in the district court's opinions dated December 28, 1979 and August 19, 1981. The claimant's first step is to request reconsideration of his claim at the District Office (DO) of the Social Security Administration (SSA). That office locates the claimant's folder (which, the district court found, is not always easy) and forwards it to the appropriate Disability Determination Agency (DDA). The claim is then subjected to de novo review, which often entails updating the file with new evidence gathered at the claimant's initiative or pursuant to a request of the DDA. When the DDA completes its reconsideration, the claim follows one of several routes. A case involving a "new" claimant (one who had not been previously receiving benefits) is rerouted to the DO and a reconsideration notice is sent to the claimant by the DDA either by computer or manually. The DDA may, however, delay sending notice while it undertakes a "quality assurance review" of its own, or sends the case to the Office of Disability Operations (ODO) in Baltimore, Maryland for a quality control review. A case involving cessation of payments to an "old" claimant (one who was previously receiving benefits) is always sent to ODO for a final review before notice of denial is sent to the claimant. In either case, once a claimant re-

ceives notice of an adverse determination or reconsideration, he is entitled to a fair hearing before an administrative law judge. The claimant is not, however, entitled to resort to federal court to reverse a denial of benefits until he has run the full gauntlet of administrative review.

In the district court, appellees claimed that two kinds of delay violated their constitutional rights under the due process clause of the fifth amendment and their statutory rights under the Administrative Procedure Act, 5 U.S.C. § 555(b)[2] and the Social Security Act, 42 U.S.C. § 405(b).[3] First, they maintained that SSA took an unreasonable amount of time to dispose of a claim once a claimant had made a request for reconsideration.[4] Second, they claimed that the time between a re-

[2] Section 555(b) provides in pertinent part that:

> With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to include all matters presented to it.

[3] Section 405(b) provides in pertinent part that:

> Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision.

In *White*, we interpreted "reasonable notice and opportunity for a hearing" as a right to a hearing within a reasonable time, 559 F.2d at 858, and the Secretary does not challenge this interpretation.

[4] In named-plaintiff Day's case, the district court found that this delay amounted to 167 days; in plaintiff Maurais's case, it was found to be 215 days. Furthermore, the district court found these delays to be within the normal range of delays experienced by Vermont SSA claimants.

quest for a hearing and the date of hearing was unreasonably lengthy.[5] In his December 1979 opinion, Chief Judge Holden granted summary judgment in favor of appellees on the latter issue, finding that the unreasonable delay in scheduling hearings contravened the Social Security Act. In his August 1981 opinion, after considerable additional briefing, the judge came to the same conclusion on the reconsideration issue. He evaluated the delay there by the same standard used on the hearing issue because he reasoned that since "[t]he time necessary to complete a reconsideration is included in the time that the claimant must wait before he is afforded a hearing . . . [u]nreasonable delays in the reconsideration procedures trench on the statutory duty to provide a hearing within a reasonable time."

Relying on our decisions in *Barnett* and *White*, Judge Holden next turned to fashioning relief for appellees' class. In a judgment entered in November 1981, the district court ordered that with certain significant exceptions,[6] reconsideration processing must be completed within 90 days of a request for reconsideration,

[5] The district court found that in this regard Day experienced a 173-day delay and Maurais, a 65-day delay. Neither delay was found by the district court to be out of the normal range.

[6] The district court excepted delays resulting from the following circumstances:

(a) The claimant offers new medical evidence or reports new medical treatment since his initial determination;

(b) the claimant agrees to undergo a consultative examination when one is suggested by the defendant;

(c) The claimant or his representative causes a delay by failing to provide information needed for reconsideration;

(d) The claimant or his representative requests a delay; or

(e) The delay is in some other way attributable to the aggrieved claimant or his representative.

and that with similar exceptions,[7] a hearing must be scheduled within 90 days of a request for hearing. Judge Holden then went on to order that interim disability payments be made, subject to the exceptions described above and to recoupment if the claimant is later found to be ineligible for disability payments, whenever no reconsideration determination is issued within 180 days of the request for reconsideration, whenever no hearing is held within 180 days of a prior request for reconsideration that is followed by a hearing request and whenever no hearing is held within 90 days of a request for a hearing.

II

On appeal, the Secretary raises several arguments that are similar to those made in our earlier cases. First, he claims that the case is nonjusticiable because Congress has entrusted the administration of the act to the Department of Health and Human Services. It is true that this argument, strengthened somewhat by the Seventh Circuit's reading of the decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), won the day for the Secretary in *Wright* v. *Califano*, 587 F.2d 345, 352-54 & 356 (7th Cir. 1978). But see *Smith* v. *Miller*, 665 F.2d 172 (7th Cir. 1981). A similar claim also gained him a partial victory in *Blankenship* v. *Secretary of HEW*, 587 F.2d 329, 335 (6th Cir. 1978). We,

[7] The district court excepted delays resulting from the following circumstances:

(a) The claimant or his representative causes a delay by failing to provide information needed for adjudication;

(b) The claimant or his representative requests a delay;

(c) The claimant or his representative fails to appear for the scheduled hearing;

(d) The delay is in some other way attributable to the claimant or his representative.

however, agree with the First Circuit's view that "while ... Congress must bear the ultimate responsibility for remedying problems in the administration of federal programs ... *cf. Vermont Yankee* ..., that does not mean that a judicial role is precluded where the statutory mandate is not being followed." *Caswell* v. *Califano*, 583 F.2d 9, 16 (1st Cir. 1978). This is particularly true when "the danger of judicial intervention is outweighed by the irreparable harm suffered by members of the plaintiff class who encounter unreasonable delays in gaining consideration of their applications." *Sharpe*, 621 F.2d at 531. See also *White*, 559 F.2d at 858-59.

Next, the Secretary argues that our previous decisions should not be followed because the increase in caseload and congressional "assumption of oversight" show that circumstances have changed significantly since the earlier cases were decided. As to the former argument, the increment in SSA's caseload is a variant of the claim made in *White* that the Secretary is precluded from adhering to a judicially mandated timetable by the "flood of claims," 559 F.2d at 859. As before, we sympathize with the severe problems that beset SSA, and we understand that Judge Holden's decision may have a significant impact on its operations. But the new statistics presented to us on this appeal do not persuade us to revise the position we took in *White:*

> Although what is reasonable depends upon a variety of circumstances, [the] statutory command should not be ignored. The disability insurance program is designed to alleviate the immediate and often severe hardships that result from a wage-earner's disability. In that context, delays of the better part of a year in merely affording an evidentiary hearing detract seriously from the effectiveness of the program. Perhaps this unfortunate impact might be diminished to a tolerable level if a high percentage of claimants seeking hearings be-

> fore an administrative law judge were not actually entitled to benefits. But such hearings have led to reversals in more than half the cases heard. (Citation omitted.)

559 F.2d at 858. We also share the First Circuit's concern that "if the Secretary's resources truly are inadequate to the task, the more litigious of the applicants may gain an advantage over the less assertive." *Caswell*, 583 F.2d at 17. But we also agree with the First Circuit's conclusion:

> However, the vindication of almost every legal right has an impact on the allocation of scarce resources. And the courts, while mindful of the impact of remedies upon persons not before them, can hardly permit the legal rights of litigants to turn upon the alleged inability of the defendant fully to meet his obligations to others.

Id.

The Secretary's claim based on alleged congressional oversight is equally unpersuasive. While it is true that in the last five years Congress has involved itself heavily in the administration of this Act, it was also carefully examining the situation at the time of *White* and *Barnett*, see 559 F.2d at 859; 580 F.2d at 31. Moreover, evidence that Congress has refused to impose its own deadlines cuts both ways. Inactivity in the face of decisions imposing deadlines can also imply that Congress is satisfied that unjustifiable delay is being handled effectively by the courts. In any case, we feel that so long as Congress has not enacted clarifying legislation or removed the term "reasonable" from the statute, our duty is to vindicate plaintiffs' interest as we see it.

The Secretary's final points are new. First, he claims that the court below erred in extending the doctrine of *White* and *Barnett* to delays in reconsideration because this level of administrative review is entirely a creature of the Secretary's discretion, and was adopted in response to Congress' concern for accurate determina-

tions of entitlement to disability insurance. We disagree. Judge Holden was correct in finding that the only meaningful way to encourage prompt adjudication is to adopt a single remedial scheme incorporating all stages of review. Furthermore, the relief ordered was crafted with an eye towards the Secretary's concerns. Thus, the judge excepted from his order delay caused by the need to garner the fresh information required to assure accurate results.

Finally, the Secretary claims that imposition of interim payments is impermissible under 42 U.S.C. § 405(i), which limits payments to those who have been certified by the Secretary "[u]pon final decision of the Secretary or upon final judgment of any court of competent jurisdiction, that [the] person is entitled to any payment or payments...." This contention has been rejected before, see *White*, 559 F.2d at 861 (finding that § 405(i) is directed at "the ordinary situation in which payments become due after favorable administrative adjudication, or judicial review," and does not "exclude[e] the possibility of interim payments ordered by a court exercising its remedial power"); *Barnett*, 580 F.2d at 33. Nonetheless, the Secretary now claims that the recent decision in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), gives his contention new force. We believe, however, that *Hansen* is distinguishable. In that case, social security claimant Hansen argued that the Secretary should be estopped from denying her benefits, for which she did not apply, because her failure to file a written application was due to misinformation given her by his representative. Our case involves neither estoppel nor a deficiency on the part of the claimant. All the claimants who have been accorded relief by the order below have, by definition, complied with the procedural requirements of the Act. Moreover, the interim payments at issue here flow from the district court's inherent powers to fashion a remedy, see *Caswell*, 583 F.2d at 17,

and cases there cited, and not from an estoppel that prevents the government from raising a defense.

We have carefully reviewed all the arguments raised by the Secretary and find them without merit.[8] For the reasons stated above, we adhere to our belief that our prior decisions were correctly decided, and we therefore affirm the judgment of the district court.

[8] Because we affirm on the ground that the delay violated appellees' statutory rights under 42 U.S.C. § 405(b), note 3 supra, we do not reach their contentions under the due process clause or the Administrative Procedure Act.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82-6009

Filed June 28, 1982

LEON S. DAY, ET AL., PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of June one thousand nine hundred and eighty-two.

Present: HON. WILFRED FEINBERG, Ch.J., HON. RICHARD J. CARDAMONE, C.J., HON. LEONARD SAND, D.J.

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER
ARTHUR HELLER
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 82-6009

Filed Sep. 17, 1982

LEON S. DAY, ET AL., PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, at the United States Courthouse, in the City of New York, on the seventeenth day of September, one thousand nine hundred and eighty-two.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Richard S. Schweiker, Secretary of Health and Human Services,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO,
Clerk

By FRANCIS X. GINDHART
FRANCIS X. GINDHART
Chief Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action File No. 78-266

Filed Dec. 31, 1979

LEON S. DAY AND AMEDIE MAURAIS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

PATRICIA ROBERTS HARRIS, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

OPINION AND ORDER

This case is presently before the court on motions by both parties for summary judgment. Oral and written arugments made by both parties in support of their respective positions have been considered. For the reasons stated below, partial summary judgment is granted for plaintiffs.

I. FACTS

Plaintiffs allege that the extensive delays experienced by them and the class which they represent[1] in the processing of appeals from denials of Title II Social Security benefits violate their statutory rights to a

[1] By order, dated June 14, 1979, this court certified the class as consisting of:

> All present and future Vermont residents seeking to secure Social Security disability benefits who, following an initial determination by the defendant that no disability exists, experience an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings.

hearing within a "reasonable time" and their constitutional right to due process.

Before examining the facts of this case, it is appropriate to outline the administrative procedure made available by the Social Security Administration (SSA) to a claimant for obtaining review of a decision denying benefits.

Once the SSA has made an initial determination that a claimant is not entitled to Title II disability benefits or that a recipient of such benefits is no longer entitled to them because his disability has terminated, the claimant may request reconsideration with the local Social Security District Office. The District Office then forwards the claimant's file to Vermont Disability Determination Services (DDS) where medical evidence is reviewed and a decision reached. Notice of the decision is sent to the claimant from DDS. Until October 1978, 10% of all initial denials and all of the cessation denials were forwarded to the Bureau of Disability Insurance (BDI) in Baltimore, Maryland, for review and eventual notification to the claimants. Since October 1978, BDI no longer reviews cessation denials. However, the files continue to be forwarded to BDI to enable that office to prepare and transmit notification to the claimants.

If a claimant receives an adverse reconsideration decision, he is then entitled to a fair hearing before an administrative law judge (ALJ). After the District Office receives this request, it is forwarded to the Hearing Office in Manchester, New Hampshire. The claim is then assigned to an ALJ. Following pre-hearing preparation, the case is scheduled for a hearing and the claimant is so notified.

It appears in the record in this case that in December 1977 the SSA determined that plaintiff Day was no longer disabled and, thus, no longer eligible for disability benefits. Although plaintiff Day requested a reconsideration of this determination on December 21, 1977,

he did not receive a determination until June 6, 1978, 167 days later. Since the determination was adverse, plaintiff made a request on June 14 for a hearing. A hearing had not yet been scheduled in November when Day filed this action for injunctive and declaratory relief. Subsequently, a hearing was held on December 4, 1978, 173 days after it was initially requested. The ALJ issued a decision on January 17, 1979 reaffirming the cessation of benefits.

Plaintiff Amedie Maurais intervened in this action on December 1, 1978, after almost six months had passed without any decision regarding his request for reconsideration. In April 1978, he was notified by the SSA that his disability had ceased in November of the previous year and that since that time he had been overpaid more than $2,000 in benefits. On June 2, 1978 he requested reconsideration and waiver of recoupment. After Mr. Maurais filed his motion to intervene, an adverse reconsideration decision was issued on January 4, 1979, 215 days after it was requested. On January 23, claimant wrote to the SSA requesting a hearing which was held 65 days later on March 29, 1979. As a result of that hearing, plaintiff Maurais' benefits were reinstated.

The defendant Secretary submitted evidence concerning the delays experienced by other Vermonters seeking relief from denials or cessation of disability benefits by the SSA. The evidence submitted by the government is not disputed by the plaintiffs and shows a widely varying range of delays. Of the cases processed by DDS during the four month period of September through December 1978, the delays in reconsideration ranged from one to 340 days. During the period January to November 1978, the DDS mean processing time per case was 30.5 days, with the mean ranging between 16.7 to 51.7 days per case. Claimants whose

cases are forwarded to BDI in Baltimore for additional processing incur additional unspecified delays.

Statistics concerning delays between request for hearing and hearing indicate that 57% of the hearings requested after January 1978 were scheduled within 90 days, with a range of delays varying between two and nine months.

II. LAW

Plaintiffs contend that the delays they have experienced in obtaining reconsideration decisions, fair hearings and hearing decisions are so lengthy as to be "unreasonable" and contrary to provisions of the Social Security Act and the Administrative Procedure Act. They maintain the excessive delays violate their rights to due process of law guaranteed by the Fifth Amendment. We consider first the legality of the delays experienced in obtaining a hearing after it is requested. Since it appears that the defendant's present policies are in violation of the Social Security Act, it is not necessary to reach the other statutory and constitutional claims.

The Social Security Act provides in pertinent part:

> The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual ... (the Secretary) shall give such applicant ... *reasonable* notice and opportunity for a hearing with respect to such decision.

42 U.S.C. § 405(b) (emphasis supplied).

In support of their position, plaintiffs rely upon the decision by this court in *Barnett* v. *Califano*, Civ. No. 74-210 (D. Vt. 1977) (Coffrin, J.), *aff'd* 580 F.2d 28 (2d Cir. 1978) and *White* v. *Mathews*, 434 F.Supp. 1252 (D. Conn. 1976), *aff'd* 559 F.2d 852 (2d Cir. 1977). Because the factual and legal issues in these cases were substantially the same as those presented in the case at bar, we

find them controlling. Accordingly, the court declines to follow the contrary approach taken in *Wright* v. *Califano*, 587 F.2d 345 (7th Cir. 1978).

In *White* v. *Mathews* the district court was presented with a class action similar to the one composed here. After examining the delays experienced by Title II claimants in Connecticut, the court found that the named plaintiff waited 274 days before his requested fair hearing was held. The average delay between request for a hearing and rendering of a hearing decision was 211.8 days. The court held such excessive delays are not reasonable within the meaning of § 405(b). The court ordered the Secretary to reduce the maximum delay between the filing of a petition for a hearing and the issuance of a hearing decision to 180 days within nine months of the court's order, to 150 days within 15 months of the order, and finally to a maximum delay of 120 days within 21 months of the order.

In *Barnett*, this court was presented with the issue of similar delays incurred by Vermont claimants of Title XVI (SSI) benefits. The named plaintiffs in that action experienced delays ranging from three to 13 months before requested hearings were held. The average delay experienced by the class plaintiffs (Vermont SSI claimants) ranged from one to 11 months. Relying upon *White*, the court held that these delays were unreasonable and ordered the Secretary to reduce the maximum delay between request for a hearing and the scheduling and holding of such hearing to 120 days within four months of the order and to 90 days within ten months of the order. The court imposed a maximum period of delay between request and holding of a hearing rather than, as the *White* court did, between request for a hearing and rendering of a hearing decision. Judge Coffrin was persuaded that such relief would afford the Secretary flexibility and at the same time protect SSI claimants' statutory rights.

The Secretary argues that the delays experienced here are not unreasonable because average or mean delays are within or close to the 90 day request-to-hearing maximum imposed in *Barnett* and the 120 day request-to-decision time imposed in *White*. The Secretary's discussion of averages and means does not meet the issue. The periods imposed in *White* and *Barnett* are periods of maximum, not average, delay which the Secretary may impose upon a claimant without violating his statutory right to a hearing within a reasonable time. While statistics afford only a limited picture of an agency's performance, the data presented by the government here reveals that in 1978 nearly half (43%) of the Vermonters who requested hearings in their claims for disability benefits waited more than 90 days for such hearings to be scheduled. This record shows that a substantial number of people have been denied their statutory right to a hearing within a reasonable time despite this court's order in *Barnett* that all such delays in SSI cases should be reduced to 90 days as of January 1, 1978. As Judge Feinberg noted in his opinion affirming that order, claimants under both Social Security programs (SSI and Disability Insurance) are entitled to a hearing within a reasonable time. *Barnett* v. *Califano*, 589 F.2d at 31-32 (2d Cir. 1978).

The Secretary presents several arguments against imposition of time limits such as those prescribed in *White*, *Barnett*, and *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978). The arguments were considered and rejected in those cases. They include the claim that the SSA has made a good faith effort to meet the needs of claimants for disability benefits while protecting the fiscal integrity of its program with the limited resources available. While the SSA has made admirable strides in reducing the average length of delay experienced by claimants a few years ago, we concur with Judge Clarie's statement in *White* that the SSA is not war-

ranted in forcing claimants to endure such lengthy delays without benefits, while it puts its administrative appeals process in order.

> When the government does not act with reasonable promptness, those claiming total disability are required to bear an unreasonable delay and suffer unwarranted deprivation of that which is lawfully theirs.

White v. *Mathews*, 434 F.Supp. 1252 at 1261 (D.Conn. 1976). This observation is particularly true of the plaintiff Maurais, whose benefits were eventually reinstated after the administrative hearing.

The Secretary next contends that because Congress has chosen not to impose deadlines, but to leave the scheduling of hearings within the discretion of the Social Security Administrator, this court should also refrain from imposing deadlines.

The Second Circuit noted in *White*, and again in *Barnett*, that the legislative history indicates that Congress' refusal to impose time limits was based on an expectation, fostered by testimony of the Administrator, that a 90 day deadline would be met by the SSA in 1977. *White* v. *Mathews*, 559 F.2d 852 at 859-860 (1977); *Barnett* v. *Califano*, 580 F.2d 28 at 31 (1978). Judicially imposed time limits will not contravene Congressional expectations.

> More importantly, the lack of an express time limit cannot alter the statutory requirement that an applicant be afforded a reasonable opportunity for a hearing. The lack of a maximum time limit does not mean that any delay is reasonable.

Barnett v. *Califano*, Civ. Action No. 74-270, Slip op. at p. 7 (D.Vt.).

Finally, the Secretary states that she has proposed new regulations which would provide the relief requested by plaintiffs, i.e., imposition of a 90 day limit on the delay between request for a hearing and its

scheduled occurrence. She asks that this court abstain from action until the agency has an opportunity to put the proposed regulations into effect. As noted above, however, there is a present and immediate statutory duty to provide hearings within a reasonable time. Present violations of statutory duties are not to go unattended until the Secretary is administratively capable of correcting the deficiency in the future.

Having determined that plaintiffs are entitled to relief the court will fashion relief in this case similar to that afforded SSI claimants in *Barnett*, as modified by the Second Circuit. *Id.*, 580 F.2d 28 at 33. Imposition of a time limit between request for hearing and holding of a hearing will hopefully provide the Secretary with more flexibility than the time limit imposed by the *White* court between request for hearing and rendering of a hearing decision.

To this limited extent, the plaintiffs' motion for summary judgment is granted on the undisputed facts presented. However, the court will defer entry of a final order to accomplish this result until the remaining claim for relief in the reconsideration procedure is heard and determined.

The delays experienced by claimants at the reconsideration stage cannot be appropriately adjudicated by summary judgment. The record, as it now stands, is inadequate. Statistics proferred by the Secretary present only a partial picture of this phase of the reconsideration process since they center only upon DDS performance. In light of the delays experienced by plaintiff Day outside of DDS,[2] reliance upon such statistics would be

[2] Although the Rutland Social Security District Office took steps to forward plaintiff Day's file to DDS on the day he requested reconsideration, DDS did not receive the file until a month later. Once it received the file, DDS made its reconsideration decision within one day and immediately returned the file to Baltimore. There it remained inactive for nearly six weeks.

misplaced. More constructive statistics should develop the length of delays incurred by applicants, rather than the processing time of one particular phase of the reconsideration stage.

As to the delays suffered by claimants between the time they request reconsideration and a reconsideration determination is issued, the motions for summary judgment are denied as to both parties. The Clerk will schedule the case for trial on the reconsideration issue. It is so ORDERED.

Dated at Rutland, in the District of Vermont, this 28th day of December, 1979.

/s/ JAMES S. HOLDEN
JAMES S. HOLDEN
Chief Judge

The file was subsequently routed back to DDS for additional medical reports and then again returned to Baltimore. Thus, although DDS processed the file in 52 days, plaintiff Day nevertheless waited 167 days after his request before BDI issued a reconsideration decision. See defendant's answer to plaintiff's interrogatory #29.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action
File No. 78-266

Filed August 19, 1981

LEON S. DAY AND AMEDIE MAURAIS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

RICHARD SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES

MEMORANDUM OF DECISION

In this certified class action the plaintiffs challenge the procedures used by the Social Security Administration (SSA) to reconsider and schedule hearings for individuals who seek, but have been initially denied, Social Security disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.* (the Act). The plaintiffs seek declaratory and injunctive relief from two types of delay encountered by claimants: the delay between the time a claimant requests reconsideration of his initial denial or cessation of benefits and the completion of the SSA's reconsideration of that finding; and the delay between the time a claimant requests an administrative hearing to review a denial of benefits and the time the hearing is scheduled.

The certified class consists of

> all present and future Vermont residents seeking to secure Social Security Disability benefits who, following an initial determination by the defendant tnat no disability exists, experienced an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings.

In an opinion and order dated December 28, 1979, the court granted partial summary judgment to the plaintiffs, holding that the delays in scheduling the administrative hearings violated the Act's statutory directive to hold hearings within a reasonable time. Applying the rule of *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978), the court required the Secretary to hold the administrative hearings within 90 days from the time they are requested, unless certain exceptions apply. The court denied the plaintiffs' motion for summary judgment on the issue of delay in the reconsideration process because the factual data in the record were not sufficient to support a summary judgment. On two subsequent occasions the court has similarly denied summary judgment on the reconsideration issue because of unresolved issues of fact.

In January, 1981, in response to discovery requests, the defendant produced factual summaries of 77 randomly selected disability reconsideration cases. Relying on their respective analyses of these summaries and all the other factual data in the record, the parties have again filed cross motions for summary judgment on the issue of reconsideration delays. The plaintiffs argue that reconsideration delays are unreasonable and request the court to direct the Secretary to complete the reconsideration process within 30 days, except in certain circumstances. The defendants maintain that the length of time to process requests for reconsideration is reasonable. Although the parties offer conflicting interpretations of the available facts, the facts themselves are not in dispute.

FACTUAL BACKGROUND

After the SSA has initially determined that a claimant is not entitled to Title II disability benefits the claimant may initiate an appeal of that denial only by requesting reconsideration of his claim at the SSA District Office (DO). *See* 20 C.F.R. § § 404.907-.910,

404.917 (1980). The DO locates the claimant's claim folder[1] and forwards it to the Vermont Disability Determination Agency (DDA). The DDA performs a *de novo* review of the evidence in the file. *See id.* § 404.914. Often, claimants seeking reconsideration allege changed medical circumstances or a worsening of condition. This review may thus include gathering new information pertaining to the claim and updating existing evidence. In some cases the DDA decides on its own to seek new evidence as well. The DDA may, at the reconsideration stage, order a consultative examination to aid in its determination.[2] *Id.* § 404.1527. In addition, if the DDA cannot make a disability determination on the basis of medical evidence alone, it may perform a vocational assessment in which a determination is made whether the claimant is capable of gainful work. *See id.* § § 404.1502-.1513.

When the DDA has completed its reconsideration, a claimant's case may follow one of several routes. If it is an "initial denial case," meaning one in which the claimant has not been receiving Title II disability payments for his claimed disability, the case folder is rerouted to the DO and a "reconsideration notice" is sent to the claimant from DDA. In several circumstances, however, generation of a reconsideration notice may be delayed. If the case involves "systems limitations" or "special handling,"[3] the reconsideration notice must be

[1] The claims folder may not necessarily be kept at the DO. Apparently some claims folders are kept at the SSA Office of Disability Operations in Baltimore, Maryland.

[2] A consultative examination is a physical or mental examination of the claimant undertaken at the expense of the SSA by a physician or other professional designated by the SSA. 20 C.F.R. § 404.1527 (1980).

[3] "Systems limitations," according to the Secretary, means that computers are not programmed to take required actions, cannot produce required information, or that the case is too

manually prepared and a delay may occur. Also, the DDA may undertake a "quality assurance review" of its own decision, thus delaying notification of the claimant. In addition, ten percent of all initial denial reconsiderations, after completion by DDA, are automatically forwarded to the Office of Disability Operations (ODO) in Baltimore, Maryland,[4] for a quality control review of the DDA determination, but the parties disagree over whether notices are sent before or after this ODO review is performed.

"Continuing disability investigation cases" in which the SSA has decided to stop paying disability benefits (also called "cessation cases"), are all sent to ODO for review prior to final reconsideration decision. The notice is sent from ODO instead of DDA.

Apart from the rather involved standard procedures, several other factors appear to contribute to the length of time to complete reconsideration: delays in requesting and receiving information, agency mishandling, new procedures, problems locating or communicating with claimants, interagency transmissions and other unaccounted for delays. It is clear that the length and nature of these delays depend somewhat upon the circumstances of each case. In any event, the procedural routes a claim must travel in the reconsideration process are uncertain and often devious.

In lieu of answers to a third set of interrogatories, the defendant submitted 77 case summaries randomly selected from a total of 453 reconsiderations performed

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complex for computer processing. Defendant's Answers to Third Interrogatories, Sept. 5, 1980, at 7. "Special handling" means, in the Secretary's words, "human intervention" or "special procedures to expedite the claims material." *Id.*

[4] The ODO was formerly called the Bureau of Disability Insurance, or "BDI"

between October 1, 1977 and January 31, 1980.[5] In the sample, total processing times ranged from 17 days to 251 days. The mean processing time was 68 days. About 35 percent of the claims, however, took more than 90 days to process. In all of the cases that took more than 90 days, as well as a significant number with lesser processing time, there are lengthy unexplained delays in the reconsideration process. The question is whether such delays are unreasonable under the circumstances. The plaintiffs interpret the summaries to show that unexceptional cases can be processed in 30 days or less, that delays beyond 30 days are almost never attributable to the claimant, and that delays beyond 90 days are generally due to DDA inaction or systems limitations and failures. The Secretary interprets the summaries to demonstrate that most delays result from the inherently time consuming nature of the reconsideration process. The summaries support the positions of both parties. They show the reconsideration process is often time consuming and complex. They also show that the process is replete with unexplained delay; other requests are processed with commendable dispatch.

DISCUSSION

This is the fourth time that the parties have addressed the reconsideration issue in summary judgment motions. Each previous time the court has found that the facts concerning the process were not sufficient. The submission of the 77 case summaries, however, satisfies the court that there are now no genuine issues of material fact in this dispute. The defendant, although he relies on the case summaries to support his own motion for summary judgment, asserts that they are

[5] Defendant's Answers to Third Interrogatories, March 30, 1981. The summaries are numbered consecutively from 1 to 77. References to specific summaries are by summary number.

not definitive or conclusive proof of delay. The court, however, finds that these summaries provide sufficient factual insight into the reconsideration process to rule on whether the delays are unreasonable.[6]

The plaintiffs contend that the delays they have experienced in obtaining reconsideration decisions are so lengthy that they are unreasonable and therefore contrary to provisions of the Social Security Act and the Administrative Procedure Act. They further argue that these delays deny them due process of law in violation of the Fifth Amendment. Because the court finds that unexplained delays that are not attributable to the claimant contravene the relevant provisions of the Social Security Act, it is unnecessary to rule on the other statutory provisions or the constitutional claim.

Section 205(b) of the Social Security Act, 42 U.S.C. § 405(b), provides in pertinent part:

> The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual ... [the Secretary] shall give such applicant ... reasonable notice and opportunity for a hearing with respect to such decision

This provision gives a claimant a right to a hearing within a reasonable time. *White* v. *Mathews*, 559 F.2d 852, 858 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). Relying upon the controlling decisions of *Barnett* v. *Califano*, *supra*, and *White* v. *Mathews*, *supra*, this court has already held that the delays experienced by the plaintiffs in obtaining a hearing after it is

[6] The defendant provided the case summaries in lieu of specific answers to the plaintiff's interrogatories requesting detailed descriptions of all delays in all reconsiderations. That the defendant chose to submit this data as representative of the reconsideration process lends support to the finding that there are no genuine issues of fact.

requested violate this provision of the Act. *Day* v. *Harris* No. 78-266 (D.Vt. Dec. 28, 1979). The court is now called upon to go beyond the holdings of *Barnett* and *White* and find that delays in the reconsideration process, before a claimant requests a hearing, violate the same provision of the Act. The court finds that they do.

A claimant, upon initial denial of his claim by the SSA, cannot obtain a hearing until after the SSA has completed reconsideration of his claim. 20 C.F.R. § 404.917 (1980). The time necessary to complete a reconsideration is included in the time that the claimant must wait before he is afforded a hearing. Reconsideration is an administrative prerequisite to an appeal from the initial denial of benefits. Unreasonable delays in the reconsideration procedures trench on the statutory duty to provide a hearing within a reasonable time.

In *Barnett*, *White*, and other cases holding unreasonable the time between requesting and obtaining a hearing, the courts have observed the special importance of prompt adjudication of disability claims, given the "'typically modest resources of the family unit of the physically disabled worker . . .'" *White* v. *Mathews*, *supra*, 559 F.2d at 859 (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 342 (1976)). Weighing against this need for expeditious determination, however, is the Secretary's desire to perform a complete, high-quality review of the initial determination. The courts must give wide deference to procedures formulated by the Secretary and the SSA, an agency "to which Congress [has] confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). Moreover, Congress has not yet imposed statutory time limits on reconsideration or hearings in Title

II cases.[7] But Congress enacted a reasonableness requirement, and "the decision not to impose precise limits should not be interpreted as an endorsement of . . . delays." *White* v. *Mathews*, *supra*, 559 F.2d at 859-60.

The Secretary principally argues that the reconsideration process is necessarily complex and time-consuming, and that delays encountered in the process are therefore reasonable under the circumstances. The court disagrees. In each of the 27 of 77 case summaries in which reconsideration took longer than 90 days there are periods of unexplained delay, not directly attributable to necessary steps in the reconsideration process. In summary #41, for example, there is an unexplained three month delay between the time DDA received the case folder and the time that a consultative examination was "required." Summary #60 contains several unexplained delays, including two and one-half months between the time a vocational evaluation was prepared and the determination of denial was signed. The defendant contends that the delays often result from the fact that a case file is at ODO when reconsideration is filed, or that the DDA has difficulty obtaining evidence from third parties, or that ODO pre-adjudicative review is conducted, or that systems limitations occur. A claimant should not, however, have to endure delays caused by inefficient agency procedures or unnecessarily lengthy internal quality control checks. Moreover, when the *explained* delays in the case summaries are subtracted, most, if not all, of the cases could have been completed within 90 days. Accordingly, the court finds that, except when delay is attributable to the claimant,

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[7] Congress has addressed the problem of delays in Title II disability claims and has received the Report of the Department of Health and Human Services, Implementation of Section 308, P.L. 96-265—Time Limitations for Decisions on Title II Benefit Claims. This report recommends a 150 day limit for reconsiderations.

delays beyond 90 days in the reconsideration process are unreasonable and in violation of the Act.

The court declines, however, to go as far as the plaintiffs ask, and find that delays beyond 30 days are unreasonable. The Secretary has determined that *de novo* review is appropriate at the reconsideration stage. This review contemplates the generation of necessary supplemental evidence in addition to review of existing materials. A reasonable time for locating the claim folder, forwarding it to the appropriate agency, obtaining and assessing additional evidence, and generating notices must be allowed. The SSA should also retain some flexibility to implement additional statutory review and notice requirements in the future.[8].

Similarly, the record does not support the Secretary's contention that a 150 day limit for the reconsideration process is reasonable.[9]. Extending the 90 day limit for holding hearings, by a 90 day limit for reconsiderations burdens an aggrieved claimant with a 180 day wait from the time he initiates review of his entitlement until he gets his hearing. When the claimant is not responsible for the time of delay to the hearing stage, anything beyond the 90 day reconsideration phase becomes unreasonable. *See White* v. *Mathews*, 434 F. Supp. 1252, 1261 (D. Conn. 1976) ("When the government does not act with reasonable promptness, those claiming total disability are required to bear an unreasonable delay and suffer unwarranted deprivation of that which is lawfully theirs"), *aff'd*, 559 F.2d 852

[8] Beginning in 1981, the Secretary is required to review 15 percent of all DDA determinations finding disability before paying benefits. 42 U.S.C.A. § 421(c)(3) (West Supp. 1981). This mandatory percentage increases to 35 percent in 1982 and 65 percent thereafter. *Id.* As of July 1, 1981, the Secretary is required to send more personalized denial notices. *Id.* § 405 note.

[9] See note 7 *supra*.

(1977), *cert. denied*, 435 U.S. 908 (1978). Of course, reconsideration delays beyond 90 days are not necessarily unreasonable when they are caused at the claimant's instance or where the delay is assignable to the claimant's contention that changed circumstances mandate reconsideration of additional evidence.

Accordingly, the court will impose a 90 day limit on the time from reconsideration request to the issuance of notice of the results of reconsideration, except in the following circumstances:

1) the claimant offers new medical evidence or reports new medical treatment since his initial determination;

2) the claimant agrees to undergo a consultative examination when one is suggested by the defendant;

3) the claimant or his representative causes a delay by failing to provide information needed for reconsideration;

4) the claimant or his representative requests a delay;

5) the delay is in some other way attributable to the aggrieved claimant or his representative.

The court will not, however, order payment of interim benefits to claimants who suffer delays of more than 90 days in the reconsideration process. Imposition of such relief would create undue complexity and difficulty in monitoring and enforcing the order.[10] Instead, the

[10] For example, if a claimant did not receive a reconsideration notice within 90 days, the Secretary would have to begin paying interim benefits. After generating a reconsideration notice denying benefits, the Secretary would then stop payments. The Secretary would then be permitted to recoup the interim benefits. *See Barnett v. Califano, supra*, 580 F.2d at 33. The process would be repeated if the Secretary failed to hold a hearing within 90 days of request. Such a remedial scheme would undoubtedly create uncertainty for claimants, implementation problems for the Secretary, and enforcement difficulties for the court.

court will order the Secretary to pay interim benefits to claimants in the event a hearing on the claimant's entitlement is not held within 180 days from the date reconsideration is requested. This will permit the SSA 90 days to complete reconsideration and 90 days to hold a requested hearing. The Secretary shall be entitled to recoup such interim benefits in the event entitlement is ultimately denied.

If the SSA takes between 90 and 180 days to complete reconsideration, but allows the claimant benefits upon reconsideration, the claimant will, of course, receive no interim relief. But the court is persuaded that this solution most appropriately balances the administrative difficulties in implementing this order and the financial needs of deserving claimants. *Cf. White* v. *Mathews*, *supra*, 559 F.2d at 860 (upholding the district court order granting interim benefits in limited circumstances as an equitable accommodation of administrative difficulties and wage earners' needs); *Caswell* v. *Califano*, 435 F. Supp. 127, 135-36 (D. Me. 1977) (ordering that disability claims hearings be held within 90 days of request, but declining to order payment of interim benefits), *aff'd*, 583 F.2d 9 (1st Cir. 1978).

The court will direct that judgment be entered after thirty days from the filing and service of a copy of this order on counsel of record. The parties may apply for leave to be heard on the settlement of the final judgment order.

It is so ORDERED.

Dated at Rutland, in the District of Vermont, this 19th day of August, 1981.

/s/ JAMES S. HOLDEN

JAMES S. HOLDEN
Chief Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 78-266

Filed Nov. 6, 1981

LEON S. DAY AND AMEDIE MAURAIS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

RICHARD S. SCHWEIKER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT.

JUDGMENT ORDER

IT IS HEREBY ORDERED that judgment be entered as follows:

IT IS HEREBY ADJUDGED that defendant's failure to provide prompt administrative reconsideration decisions and prompt administrative law judge hearings to claimants for Title II disability insurance benefits residing in the District of Vermont who request such reconsideration and/or hearing before an administrative law judge following adverse initial determination by the defendant that they are not disabled conflicts with the "reasonable notice and opportunity for a hearing" requirement of 42 U.S.c. § 405(b).

IT IS FURTHER ORDERED AND ADJUDGED THAT:

(1) The plaintiffs' motion for class certification was GRANTED on June 14, 1979, the class consisting of:

> all present and future Vermont residents seeking to secure Social Security Disability benefits who, following an initial determination by the defendant that no disability exists, experienced an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings.

(2) The defendant is enjoined, ordered, and directed to conclude reconsideration processing and issue reconsideration determinations within 90 days of requests for reconsideration made by claimants, pursuant to 20 C.F.R. § 404.909 or other applicable regulations, seeking Title II disability insurance benefits under § 205(b) of the Social Security Act, 42 U.S.C. § 405(b), except in the following circumstances:

(a) The claimant offers new medical evidence or reports new medical treatment since his initial determination;

(b) The claimant agrees to undergo a consultative examination when one is suggested by the defendant;

(c) The claimant or his representative causes a delay by failing to provide information needed for reconsideration;

(d) The claimant or his representative requests a delay; or

(e) The delay is in some other way attributable to the aggrieved claimant or his representative.

(3) The time period aforementioned in paragraph (2) shall apply to reconsideration requests made on or after the effective day of this order and shall commence with the date of receipt by defendant of a formal written request for reconsideration filed pursuant to 20 C.F.R. § 404.909 or other applicable regulations. In the event that the last day of said time period falls upon a Saturday, Sunday, or legal holiday (as defined by Fed. R. Civ. P. Rule 6(a)), the enumerated period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(4) The defendant is enjoined, ordered, and directed to conduct administrative law judge hearings within 90 days of requests for hearings made by claimants for Title II disability insurance benefits pursuant to § 205(b)

of the Social Security Act, 42 U.S.C. § 405 (b), except in the following circumstances:

(a) The claimant or his representative causes a delay by failing to provide information needed for adjudication;

(b) The claimant or his representative requests a delay;

(c) The claimant or his representative fails to appear for the scheduled hearing

(d) The delay is in some other way attributable to the claimant or his representative.

(5) The time period aforementioned in paragraph (4) shall apply to hearing requests made since issuance of the Court's preliminary injunction on December 30, 1980, and shall commence with the date of receipt by defendant of a formal written request for hearing filed pursuant to 20 C.F.R. § 404.933 or other applicable regulations. In the event that the last day of said time period falls upon a Saturday, Sunday or legal holiday (as defined by Fed. R.Civ.P. Rule 6(a)), the enumerated period shall run until the end of the next day which is not a Saturday, Sunday or legal holday.

(6) The defendant is enjoined, ordered and directed to grant prospective interim Title II disability insurance payments to Title II disability claimants in any of the following circumstances:

A. No reconsideration determination is issued within 180 days of the request for reconsideration. Said payments shall begin with the first month after the month in which the 180 day time limit is exceeded and shall end with the conclusion of the month in which the reconsideration determination is mailed. Said time period shall apply to the reconsideration requests made on or after the effective date of this Order and shall commence with the date of receipt by defendant of a formal written request for reconsideration filed pursuant to 20 C.F.R. § 404.909 or other applicable regulations.

B. No hearing is held within 180 days of a prior request for reconsideration that is followed by a hearing request. The passage of time between the issuance of the written decision of reconsideration and the date of receipt of the written hearing request shall be excluded from this time period. The interim payments shall begin with the first month after the month in which the 180 day time limit is exceeded and shall end with the conclusion of the month in which the hearing before the administrative law judge is held. Said time period shall apply to reconsideration requests made on or after the effective date of this Order and shall commence with the date of receipt by defendant of a formal written request for reconsideration filed pursuant to 20 C.F.R. § 404.909 or other applicable regulations.

C. No hearing is held within 90 days of a request for hearing. Said payments shall begin with the first month after the month in which the 90 day time period is exceeded and shall end with the conclusion of the month in which the hearing before an administrative law judge is held.

Nothing in this order shall be construed to require the payment of retroactive Title II disability insurance benefits based upon the alleged date of disability onset. Nothing in this order shall be construed to limit the defendant's right to recover payments made under this paragraph, pursuant to standard overpayment procedures, if it is finally determined that the individual so paid is not under a disability for any period in which the payments are made pursuant to this paragraph.

(7) Benefits paid pursuant to this order shall be suspended if the claimant refuses to cooperate in attending a scheduled hearing or in going to a consultative examination or in obtaining any other necessary evidence.

(8) Beginning with each applicable administrative appellate request received on the 61st day after the entry of this order and continuing thereafter, the defendant is directed to notify in writing each claimant who requests

a reconsideration or an administrative law judge hearing of his or her rights under the order by including a brief statement of the rights accorded hereunder. Said written notice may be given to the claimant personally or may be included in any mailing to the claimant regarding his appellate request but shall not require a separate special mailing by the Social Security office. The plaintiff and defendant will provide this Court with an agreed upon statement of notice.

(9) This order shall become effective on the sixty-first day following its entry except as otherwise provided in paragraphs 5 and 6 *supra*.

(10) This order shall not apply to claims for concurrent benefits under Title II and Title XVI, which are included in *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978), but shall apply to disability claims under Title II only.

(11) This decree shall be binding upon the Secretary of Health and Human Services when adjudicating administrative reconsiderations and hearings within the State of Vermont.

(12) Within sixty (60) days from the date of this Order, the defendant shall submit to the Court and to the plaintiffs' attorneys a detailed statement or plan for implementing the relief required herein on a continued basis, and the actual administrative steps taken to effectuate said plan. Any disputes between the parties as to whether the procedure and steps outlined by the defendant will fulfill the requirements of this Order shall be resolved by the Court.

(13) This Court shall retain continuing jurisdiction over this cause to insure compliance with the provisions of this Order for a period of no less than one year from the date hereof.

Dated at Rutland, in the District of Vermont, effective this 30th day of October, 1981 and entered November 6, 1981.

/s/ JAMES S. HOLDEN

HONORABLE JAMES S. HOLDEN
Chief Judge
U.S. District Court for the
District of Vermont